

Martin

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220848 **DATE:** February 5, 1986
MATTER OF: Teleflex Incorporated

DIGEST:

1. An IFB amendment that corrected a configuration designation in the schedule for prices and specification to conform to the drawings and manuals included in the IFB was not material since it neither added nor subtracted from the required work. Thus, the low bidder's failure to acknowledge receipt of the amendment should have been waived.
2. A low bidder's failure to acknowledge an amendment that decreases the cost of performance should be waived since there is clearly no prejudice to other bidders.

Teleflex Incorporated protests the Department of the Navy's rejection of its low bid submitted in response to invitation for bids (IFB) No. N68520-85-B-9130, a procurement to obtain all services, equipment and materials necessary to disassemble, inspect, overhaul and update a number of linkless ammunition loading systems. The rejection resulted from Teleflex's failure to acknowledge receipt of an amendment that it alleges it did not receive until after bid opening. Teleflex contends that the contract was improperly awarded to a competitor at a price for the first year more than \$1,200,000 above the price by Teleflex. We have been informed by the Navy that on December 6, 1985, the Commander, Naval Air Systems Command, as head of the contracting activity, determined that performance was in the best interest of the government, notwithstanding the pending protest, because the systems to be overhauled and repaired were necessary to support naval aircraft essential to the operational readiness of the fleet aircraft carriers. Performance of the contract by the awardee was then authorized by the contracting officer.

We sustain the protest.

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Timeliness

The Navy challenges the timeliness of Teleflex's protest, filed on October 11, 1985, pointing out that bid opening was on August 23 and that Teleflex knew before September 10 that its bid had been found to be nonresponsive for failure to acknowledge a material amendment.

We disagree. The record indicates that Teleflex was first informed of the rejection of its bid and the award to a competitor at a higher price by a letter from the Navy dated October 11, 1985. Thus, our receipt of Teleflex's protest on October 18 was well within the 10-working-day period required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1985). The Navy was notified of the protest on the same day we received it.

Background

The reference in the schedule of the IFB stated that the work to be done must comply with the "7th Production Buy Configuration." However, the attached drawings and manuals depicted the sixth, rather than the seventh, configuration. When the manufacturer called this to the Navy's attention, the contracting officer decided that the technical changes in the seventh configuration were both unnecessary and potentially expensive. He then issued an amendment requiring the work to comply with the sixth configuration, thereby removing the "obvious conflict between the specification's requirement for the seventh configuration and the description in the drawings and technical manuals for the sixth configuration." The amendment made no changes to the drawings and manuals that accompanied the original solicitation.

When the three bids received were opened on August 23, 1985, the low bid was rejected and Teleflex's bid became low. However, Teleflex failed to acknowledge the amendment. The Navy contends that its records indicate the amendment was sent to Teleflex on August 7 and that, as a result of a telephone request of September 9, another copy was sent on September 10. Teleflex insists that it did not receive the amendment until September 10 and that this resulted from its telephone request for the amendment. Teleflex attempted to submit an amended bid on October 11 that substantially reduced its price further. Also, on October 11, the Navy sent a letter notifying Teleflex that its initial bid had

been rejected for failure to acknowledge receipt of the amendment and that award had been made to the third low bidder at a price substantially above Teleflex's initial price (award was made on the same date). By letter of October 15, Teleflex protested directly to the contracting officer and, on October 18, we received a protest from Teleflex, to which was attached a copy of the protest to the Navy. The Navy denied Teleflex's protest in a letter of October 28.

Discussion

A bidder's failure to acknowledge receipt of a material amendment to an IFB renders the bid nonresponsive since, in the absence of such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as reflected in the amendment. Southeast Engineering, B-215855, Sept. 11, 1984, 84-2 CPD ¶ 283. An amendment is material, however, only if it would have more than a trivial impact on price, quantity, quality, delivery, or the relative standing of the bidders.. G.C. Smith Construction Co., B-213525, July 24, 1984, 84-2 CPD ¶ 100; Federal Acquisition Regulation (FAR), § 14.405, (FAC 84-5, April 1, 1985). An amendment is not material where it merely clarifies an existing IFB requirement and the bidder's failure to acknowledge such an amendment is waivable as a minor informality. See Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 CPD ¶ 284.

As noted earlier, the amendment that Teleflex failed to acknowledge in its initial bid made no changes in the drawings and technical manuals that were included in the initial bid package. These drawings and manuals described the sixth configuration even though the schedule referred to the seventh configuration. Since the amendment only changed the configuration designation to conform to the configuration already reflected in the drawings and manuals, we fail to understand why this change was considered to be material.

Thus, in our view, the amendment did not materially affect the legal obligations of the parties and the failure to acknowledge it could be waived. Gibraltar Industries, Inc., B-218537.3, July 3, 1985, 85-2 CPD ¶ 24. In any event, the seventh production buy configuration was considered to be more expensive than the sixth, although apparently the seventh meets or exceeds the Navy's needs, yet Teleflex's price without the amendment

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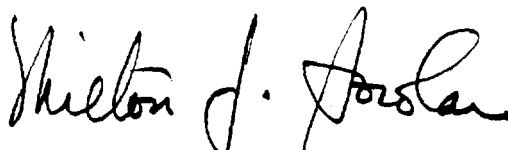
was over a million dollars below that of the awardee. The failure of a bidder to acknowledge an amendment that decreases the cost of performance therefore should be waived, since there is clearly no prejudice to other bidders. MBAssociates, B-197566, June 4, 1980, 80-1 CPD ¶ 383. Hence, there was no valid reason for rejecting the bid in any case.

Recommendation

By separate letter of today to the Secretary of the Navy, we are recommending that if Teleflex is found to be a responsible prospective contractor, the Navy terminate the contract awarded for the convenience of the government and award the remainder of the contract to Teleflex at its amended bid price. If Teleflex is unwilling to accept the award for that portion of the contract that is not completed, we recommend that Teleflex be reimbursed for the costs of preparing its bid and for filing and pursuing the protest. If Teleflex refuses the award, we further recommend that no options be exercised and that the then existing requirement be recompeted.

Our recommendation is made without regard to the extent of performance, the cost of termination, or the potential disruption since performance was authorized under 41 U.S.C.A. § 3553(d)(2)(A)(i) (West Supp. 1985), as required by 41 U.S.C.A. § 3554(b)(2). W.S. James, Inc., 64 Comp. Gen. 561, 85-1 CPD ¶ 623.

The protest is sustained.

for 
Comptroller General
of the United States